

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 In re:,

00 Cv. 1898 (SAS)

4 MTBE,

5 -----x

6 New York, N.Y.
7 December 14, 2015
4:30 p.m.

8 Before:

9 HON. SHIRA A. SCHEINDLIN,

10 District Judge

11 APPEARANCES

12 LAW OFFICES OF JOHN K. DEMA, P.C.

Attorneys for Commonwealth of Puerto Rico

13 NATHAN SHORT

14 MOUND COTTON WOLLAN & GREENGRASS, LLP

Attorneys for Trammo Caribbean and Trammo Petroleum

15 ROBERT S. GOODMAN

16 BARRY R. TEMKIN

1 THE COURT: Please be seated.

2 Mr. Short?

3 MR. SHORT: Yes. Good afternoon, your Honor.

4 THE COURT: Mr. Goodman?

5 MR. GOODMAN: Yes. Good afternoon, your Honor.

6 THE COURT: And Mr. Temkin?

7 MR. TEMKIN: Yes. Good afternoon, your Honor.

8 THE COURT: I have three letters in front of me that
9 relate to Trammo Caribbean and Trammo Petroleum. There's a
10 December 12th letter from the Commonwealth of Puerto Rico, a
11 December 12th letter from Trammo Caribbean and Trammo
12 Petroleum, and then a December 14th supplemental letter from
13 Trammo Caribbean and Trammo Petroleum.

14 The issues seem pretty straightforward. The first is
15 whether there can be a Rule 41(a)(1) voluntary dismissal in
16 Puerto Rico I as to Trammo Caribbean; that seems clear. And
17 the question is, what about Puerto Rico II with respect to
18 Trammo Caribbean? Then, with respect to Trammo Petroleum, it
19 was dismissed from Puerto Rico I for lack of personal
20 jurisdiction, how could it be much different in Puerto Rico II?

21 That's our little agenda. It's always helpful if the
22 Court tells you what she's thinking so you know what to argue
23 for or against, so to speak.

24 I've said already, if it can be the 41(a)(1) dismissal
25 in Puerto Rico I by Trammo Caribbean, in Puerto Rico II, I

1 think the dismissal has to be with prejudice, not without
2 prejudice, because the Delaware law under which it's being
3 dismissed is analogous to a statute of limitations dismissal,
4 and that should be with prejudice.

5 As far as Trammo Petroleum, Inc., which I should call
6 TPI for the sake of simplicity, it was dismissed in Puerto Rico
7 I for lack of personal jurisdiction. I can't imagine
8 anything's changed. I don't see why it wouldn't be dismissed
9 for the same reason in Puerto Rico II.

10 That's where I come out on the three issues. Anybody
11 want to be heard?

12 MR. SHORT: If I may. In the Second Circuit, the
13 presumption for a plaintiff seeking to dismiss its own claim is
14 to grant without prejudice absolute --

15 THE COURT: I'm doing that under 41(a)(1) for the
16 Puerto Rico I. But in Puerto Rico II, we're not under that
17 rule. Period, full stop. We're not under 41. It was their
18 responsive motion. It was converted to a summary judgment.
19 You knew that. It was converted first to 12(b)(6), then was
20 converted to a summary judgment. It is a responsive pleading
21 in every way, and then the only question is with or without
22 prejudice. So it's no longer your dismissal. It's not a
23 voluntary dismissal.

24 MR. SHORT: No. Understood. In a 41(a)(2) context --

25 THE COURT: Go ahead.

1 MR. SHORT: Understood, your Honor.

2 THE COURT: Just ignore me. Go ahead and talk.

3 MR. SHORT: I'll move on to the next item.

4 The issue of the dissolution of Trammo Caribbean.

5 Although counsel for Trammo Caribbean has said that it is
6 analogous to a statute of limitation is a different argument,
7 it's a different beast. It was first argued as a 12(b)(2)
8 motion as a personal jurisdiction item.

9 I think it's important to recognize that in Delaware,
10 Trammo Caribbean had an opportunity to engage in a windup
11 process that would have shielded its shareholders and
12 directors. It did not engage in that process. Now it seeks to
13 have a with prejudice dismissal that would have the same
14 effect.

15 There would be a prejudice to the Commonwealth if it
16 were dismissed with prejudice because it's possible it could be
17 deemed as a dismissal on the merits. Because of the entities,
18 like shareholders and directors, that may hold liability, the
19 Commonwealth may be precluded to go after those entities in
20 another forum.

21 I understand the Court's position on whether or not we
22 can seek Trammo Caribbean here. My main concern for
23 Commonwealth is whether or not we will be able in the future to
24 go after the shareholder that received distributions in advance
25 of the filing the certificate of dissolution or a director that

1 did not comply with statutory dissolution windup procedures.

2 That's the prejudice that the Commonwealth would experience.

3 If your Honor would like, I could move to Trammo
4 Petroleum.

5 THE COURT: Well, in a minute.

6 MR. SHORT: Certainly.

7 THE COURT: I'm not sure I understand what you just
8 said. The party we're talking about is Trammo Caribbean.

9 MR. SHORT: Correct.

10 THE COURT: You're talking about worrying about
11 outside directors, or directors, or whatever. What's that got
12 to do with the with prejudice dismissal as to Trammo Caribbean?

13 MR. SHORT: Because, if I could quote this small
14 section. We're concerned about claim preclusion that would bar
15 litigation of claims that were or could have been brought in
16 earlier litigation between the same parties or their privies.
17 We're concerned about the privies. The directors and the
18 shareholders --

19 THE COURT: All right. So how about if it reads "with
20 prejudice as to Trammo Caribbean only"? I think that does it.

21 MR. SHORT: Could we possibly include "and not its
22 shareholders or directors or privies"?

23 THE COURT: I have no problem with that. I don't
24 think it should bar that. Trammo Caribbean, that's whose
25 name -- and I wasn't aware of what you read about "or their

1 privies". Where was that from that you read?

2 MR. SHORT: That is from Burberry Ltd. v. Horowitz.
3 It's a Second Circuit case from 2013, 534 Fed.App'x 41 at
4 page 43.

5 THE COURT: Certainly was not what I had in mind. I
6 had in mind that it was with prejudice as to Trammo Caribbean,
7 and only Trammo Caribbean.

8 Why don't you move to the third topic while you're at
9 it, which is Puerto Rico II as to TPI. Is that what you were
10 going to turn to?

11 MR. SHORT: It would be for both Puerto Rico I and
12 Puerto Rico II for Trammo Petroleum.

13 THE COURT: I already dismissed Puerto Rico I based on
14 lack of personal jurisdiction.

15 MR. SHORT: I understand. I think that the Court may
16 not have been aware of supplemental briefing that occurred when
17 Trammo opposed the Commonwealth's motion to revise prior
18 orders. The reply from the Commonwealth included a number of
19 documents that speak to personal jurisdiction. The
20 Commonwealth is currently going to be filing a motion for
21 reconsideration for those.

22 I understand, your Honor. We don't take this lightly.
23 Trammo Petroleum did contract and I do have --

24 THE COURT: Then there's nothing more to say until I
25 decide the reconsideration, because the bottom line is, Puerto

1 Rico II has to follow Puerto Rico I. It's either yes for both
2 or no for both. That's all I came prepared to talk about
3 today. I can't even consider a motion for reconsideration that
4 I've never seen.

5 MR. SHORT: Understood. If I may add --

6 THE COURT: I hope you're not adding any new
7 information, because you can't do that on a motion to
8 reconsider.

9 MR. SHORT: I would like to highlight one production
10 that was made last month of a document that speaks to personal
11 jurisdiction for Trammo Petroleum. It's a frame agreement.

12 THE COURT: How long ago was it? Was it before me
13 when I decided the motion?

14 MR. SHORT: That particular document was not before
15 you.

16 THE COURT: How can you add it now? That violates the
17 rules of reconsideration. You can't alter the record. Newly
18 discovered evidence? You didn't have it originally?

19 MR. SHORT: It was produced by Trammo's counsel last
20 month.

21 THE COURT: I know. Was that after I ruled? Before I
22 ruled?

23 MR. SHORT: It was --

24 THE COURT: Before I ruled.

25 MR. SHORT: -- I believe in November, and it preceded

1 your most recent ruling.

2 THE COURT: Why didn't you send it in right away and
3 say, "This is a supplemental submission on personal
4 jurisdiction. You better take this into account before you
5 rule."

6 MR. SHORT: The initial opinion dismissing Trammo
7 Petroleum was on a statute of limitations grounds.

8 THE COURT: No, I'm talking about this.

9 MR. SHORT: I understand. It's two steps, and if you
10 could, pardon me, bear with me for a moment.

11 The initial opinion dismissing Trammo Petroleum, you
12 reversed that --

13 THE COURT: I understand.

14 MR. SHORT: -- and for the first time ruled on
15 personal jurisdiction.

16 THE COURT: Correct. But that was pending all along.
17 I just hadn't reached it the first time because I didn't need
18 to, but it was a pending motion.

19 MR. SHORT: Between those two periods, the
20 Commonwealth submitted a reply to the Trammo defendant's
21 opposition to the Commonwealth's motion to revise prior orders.
22 It is a mouthful. Those documents were included at that time.
23 I'm not sure --

24 THE COURT: So you're saying I had it before me when I
25 ruled, but I overlooked it.

1 MR. SHORT: Yes.

2 THE COURT: That's permitted. If it was in the record
3 before the Court and the Court overlooked it, then the Court
4 has to reconsider. Okay.

5 MR. SHORT: That being said, there is a new document
6 that was November, and I understand your position on that.

7 THE COURT: Well, my position, so-called, is if it's
8 newly discovered after my decision, you're allowed to raise it
9 if it's newly discovered. But if you had it before the
10 decision, you had an obligation to submit it.

11 MR. SHORT: I think the thought process --

12 THE COURT: But procedurally, procedurally, maybe I
13 understand it. You were hoping there wouldn't be any change in
14 the prior ruling, and personal jurisdiction was really not in
15 play. It was only when the Court vacated that earlier opinion
16 and reached personal jurisdiction that you had reason to note
17 that you should have submitted that.

18 MR. SHORT: Yes, your Honor.

19 THE COURT: Yes. So you probably can submit that.
20 The bottom line is, on Puerto Rico I and II with respect to
21 TPI, until I see the motion to reconsider, there's nothing more
22 to say. All I came on the bench ready to say is it has to be
23 the same. With respect to personal jurisdiction, it's both or
24 not either, they can't differ between them.

25 MR. SHORT: Thank you, your Honor.

1 THE COURT: With respect to the with prejudice
2 dismissal of Caribbean, if it excluded the -- you called it
3 shareholders and directors and privies, then you have no
4 problem.

5 MR. SHORT: I would need authority from the client,
6 but I would be willing to recommend that.

7 THE COURT: Anybody want to be heard on this side of
8 the table?

9 MR. GOODMAN: Yes, your Honor. Robert Goodman Mound
10 Cotton Wollan & Greengrass.

11 This TCI was dissolved in 2007. Long time ago. Eight
12 years ago.

13 THE COURT: Right.

14 MR. GOODMAN: To start talking about directors and
15 shareholders from 2007, any statute of limitations I ever heard
16 of would have run a long time before that.

17 THE COURT: That may well be. I don't know if they're
18 ever going to do it, but all he's saying is that he doesn't
19 want to be precluded with a with prejudice dismissal from
20 trying.

21 If he turns around and sues some director now, the
22 first thing that's going to happen is you're going to make a
23 motion to dismiss for being time disbarred and probably ask for
24 sanctions, too. It may be so time barred, what are you
25 thinking? Bottom line, he'll never do it, but I guess he wants

1 the theoretical possibility to exist.

2 MR. GOODMAN: I would think just staying that it's
3 with prejudice with respect to Trammo Caribbean itself should
4 be sufficient. I don't think you have to omit everybody else
5 in the world.

6 THE COURT: I think I will, because I didn't have that
7 in mind. Clearly, in my mind, when I said it should be with
8 prejudice, it seems to me open and shut as to Trammo Caribbean,
9 and only Trammo Caribbean, it should be with prejudice.
10 Whether he ever decides to go after a shareholder or director
11 or -- what was the third thing you said?

12 MR. SHORT: An entity in privity.

13 THE COURT: -- or anybody in privity, it sounds so
14 obviously time barred, but we'll see if and when. If and when.

15 MR. GOODMAN: Your Honor, I would also note that with
16 my letter today, I submitted a proposed order on Trammo
17 Caribbean's motion for summary judgment. That winds up with a
18 dismissal with prejudice. If you put the extra language in
19 that --

20 THE COURT: I am going to.

21 MR. GOODMAN: Okay. I would ask that you put that in
22 and that be signed.

23 THE COURT: You understand what he was saying about
24 TPI. He's got a pending motion to reconsider, and I have to
25 look at it. I don't have a choice. But I do say, it comes out

1 the same in Puerto Rico I and II, whatever the answer is.

2 MR. GOODMAN: Our obligation to answer runs to today
3 on behalf of TPI and PR2, so do I understand that your Honor is
4 dismissing TPI in PR2 on grounds of lack of personal
5 jurisdiction?

6 THE COURT: No. I'm not reaching it. He's moving to
7 reconsider the motion to dismiss, or the decision on the motion
8 to dismiss for lack of personal jurisdiction, so why do
9 anything with respect to PR2. But he extends your time to
10 answer, right, until --

11 MR. SHORT: Certainly, your Honor.

12 THE COURT: -- until whatever, 21 days after I decide
13 the reconsideration. So not to worry about it, and that's on
14 the record. You're certainly not going to be in default while
15 all of this is pending.

16 MR. GOODMAN: Thank you, your Honor. I just wanted to
17 be clear on where we were on that.

18 THE COURT: And you are clear now.

19 MR. GOODMAN: Yes, I am.

20 THE COURT: Okay.

21 MR. GOODMAN: Thank you, your Honor.

22 THE COURT: Is there anything more now?

23 MR. SHORT: I think we've covered the two items, your
24 Honor.

25 THE COURT: Okay.

1 MR. GOODMAN: Agreed, your Honor.

2 THE COURT: When is this motion coming?

3 MR. SHORT: I believe the deadline is Thursday.

4 MR. GOODMAN: That's correct, your Honor. My
5 understanding.

6 THE COURT: I'll see what he points to.

7 My rules say that I don't want a response on a motion
8 to reconsider unless I alert you, but this one sounds like I'll
9 probably need it, because he is bringing to my attention
10 information that was either overlooked or added, so I'll
11 probably need a response.

12 MR. GOODMAN: So shall I just take it that we should
13 respond?

14 THE COURT: I think on this one, yes.

15 MR. GOODMAN: Thank you.

16 THE COURT: Okay.

17 MR. GOODMAN: So we have about two weeks to respond on
18 that?

19 THE COURT: Work it out.

20 MR. GOODMAN: We'll work it out, because I know we're
21 getting toward the year end.

22 THE COURT: Yes, work it out. But not months, of
23 course. Weeks, not months. Okay?

24 MR. GOODMAN: All right.

25 MR. SHORT: Yes.

1 THE COURT: Thank you.

2 MR. SHORT: Thank you, your Honor.

3 (Adjourned)

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